Supreme Court, U.S.
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No.

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In The

Supreme Court of the United States

October Term, 1995

ROBERT CLARK AND BILLIE CLARK, HUSBAND AND WIFE; ROBERT ANSON CLARK, A MINOR CHILD BY AND THROUGH HIS MOTHER AND NEXT FRIEND, BILLIE CLARK; BRANDI JONES AND BRITINI JONES, MINOR CHILDREN BY AND THROUGH THEIR MOTHER AND NEXT FRIEND, ANGELA MARIE JONES; BRANDON NEAL CLARK, A MINOR CHILD BY AND THROUGH HIS MOTHER AND NEXT FRIEND, MARY LOU DUVALL,

Petitioners,

vs.

THOMAS WILLIAM BRIEN, REPRESENTATIVE OF UNDERWRITERS AT LLOYD'S LONDON,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to clarify whether it was improper for the Tenth Circuit Court of Appeals to take the case away from the trial court and the jury and grant Respondent's motion for judgment as a matter of law, based on the appellate court's own inconsistent findings of fact.

PARTIES TO THE PROCEEDING

Petitioners, Robert Clark and Billie Clark, a husband and wife, and Robert Anson Clark, a minor child, Brandi Jones and Britini Jones, Angela Marie Jones, Brandon Neal Clark, Mary Lou Duvall, are residents of Purcell, Oklahoma. They were the Plaintiffs in the lower court proceedings of this case and were the Appellees before the United States Court of Appeals for the Tenth Circuit.

Respondent, Thomas William Brien, is the representative of Underwriters at Lloyd's London. Brien was the Defendant in the lower court proceedings, and was the Appellant before the United States Court of Appeals for the Tenth Circuit.

There are no other parties to this action.

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No.

In The

Supreme Court of the United States

October Term 1995

ROBERT CLARK AND BILLIE CLARK, HUSBAND AND WIFE; ROBERT ANSON CLARK, A MINOR CHILD BY AND THROUGH HIS MOTHER AND NEXT FRIEND, BILLIE CLARK; BRANDI JONES AND BRITINI JONES, MINOR CHILDREN BY AND THROUGH THEIR MOTHER AND NEXT FRIEND, ANGELA MARIE JONES; BRANDON NEAL CLARK, A MINOR CHILD BY AND THROUGH HIS MOTHER AND NEXT FRIEND, MARY LOU DUVALL,

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vs.

THOMAS WILLIAM BRIEN, REPRESENTATIVE OF UNDERWRITERS AT LLOYD'S LONDON,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On December 17, 1994, the United States District Court for the Western District of Oklahoma, upon presentation of the case to the jury, found for the Petitioners in their claim of intentional infliction of emotional distress against the Respondents. On July 14, 1995, the United States Court of Appeals for the Tenth Circuit issued its opinion, reversing the district court's denial of Respondent's Rule 50(b) motion for judgment as a matter of law, instructing the district court to vacate the jury verdict and damage awards for each of the Petitioners on their intentional infliction of emotional distress claim and enter judgment in favor of the Respondent.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the Unites States Court of Appeals for the Tenth Circuit and its judgment of July 14, 1995. That judgment reversed the lower court's denial of Respondent's Rule 50(b) motion for judgment as a matter of law. Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Rule 50 (b) provides:

> Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings.
>
> (b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial.
>
> Whenever a motion for a judgment as a

> matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

STATEMENT OF THE CASE

Petitioners include Robert and Billie Clark, their son Robert Anson Clark, their granddaughters Britini and Brandi Jones, and their grandson Brandon Neal Clark, all of whom allegedly suffered severe emotional distress from the guards' and Bigbee's behavior.

In 1988, Robert Clark and his wife Billie Clark purchased an insurance policy on their home. The policy was issued jointly by

Lloyd's and by Sphere Drake Insurance Company. In 1989, the Clarks contacted their insurance agent to clarify whether their policy also covered a separate home in which the Clarks had a financial interest. This other home was destroyed by fire. After this inquiry into their coverage, Lloyd's had its authorized agent Acton Inc., hire an adjuster to obtain information on the Clarks and their properties. The adjuster, Bill Bigbee, under the supervision of Bill Starbuck, discovered that the Clarks were involved in past fires, one or more of which had destroyed houses on the property that Lloyd's and Sphere Drake were insuring. The causes of these fires is believed to be faulty electrical units. As a result of this information, Acton Inc. notified the Clarks of the cancellation of their insurance policy on January 19, 1989. In compliance with the policy's thirteen day notice requirement, the cancellation was to take effect on February 1, 1989.

On January 23, 1989, Robert Clark informed Acton Inc. that he would be away from his property for a short period. Upon hearing this, Max Acton, the head of Acton Inc., became concerned that the Clark home might burn down prior to the policy cancellation took effect. As a result, several armed guards were hired to conduct twenty-four hour constant surveillance of the Clarks' property during the period between January 23 and 31. Bill Bigbee was put in charge of this surveillance operation. These guards were stationed at or near the property line and instructed to watch the home and to notify the authorities if they noticed any signs of fire. Acton, Inc. or Bigbee also hired a separate investigator, Donald Leonard, to photograph the Clark's property and any individuals entering or leaving the home. As a result of the placement of these guards, the Clarks were denied police protection.

Based on misconduct by the guards and Bigbee during this period of surveillance, the Clarks filed suit against Lloyd's and Sphere Drake as the joint issuers of their insurance policy. The

guards committed trespass and intentional infliction of emotional distress, for which the two companies should be held ac ountable under the theory of *respondeat superior*/principle-agent liability.

At trial, members of the Clark family testified that the guards did not just passively surveil their home from adjacent land, but actually trespassed upon their land, thus inflicting great stress and fear. Because Robert Clark did not know who the guards were or their reason for being there, he and his family were terrorized by these armed men. Mr. Clark became so concerned that he had to drive his visiting family members back to their home out of fear for their safety and well-being. Upon returning home, Robert Clark found his wife, child, and three grandchildren locked inside the home. The family was extremely upset and informed Clark that the guards had shot and killed the family dog, Bandit. At this point Robert Clark went outside to investigate. Outside, Clark found a pool of blood on his property and evidence that the dog was dragged over to and thrown over their fence. Bigbee was the individual who shot the family pet, as witnessed by one of the hired guards.

During the course of this incident, the armed guards never identified themselves to the Clarks, nor did they inform the frightened family of the reason for their presence. Acton and Bigbee, knowing that the family was being terrorized, continued the surveillance. Even after the dog had been shot, the guards were left on the property for several more days, further terrorizing the family.

At the end of the trial, the trial court overruled Respondent's motion for directed verdict. The jury returned a verdict in favor of the Clark family, including damages for their child and two grandchildren for a total of $500,000 actual and punitive damages. The Respondent filed a motion notwithstanding the

verdict, which was also overruled. Respondent then appealed to the Tenth Circuit Court of Appeals who, on July 14, 1995, reversed the trial court, setting aside the jury verdict and ordering judgment entered in favor of the Respondent.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER IT WAS IMPROPER FOR THE TENTH CIRCUIT COURT OF APPEALS TO TAKE THE CASE AWAY FROM ORIGINAL FACT FINDERS, BASED ON THE APPELLATE COURT'S OWN INCONSISTENT FINDINGS OF FACT.

This application for writ of certiorari comes as a result of the decision of the Tenth Circuit Court of Appeals. The appellate court's decision was improper, in that it effectively took questions away from the trial court and the jury, the original fact finders, based on a misapplication of law and misconstrued understandings of the facts of the case. The Petitioners' position is that the decision reached by the appellate court should be reviewed and reversed by this Honorable Court due to such misunderstanding and its resulting inconsistent legal decision.

Petitioner asserts that the appellate court's decision should be vacated because it deprives the trial court and the jury, those persons who have heard testimony first-hand, weighed credibility and considered the relevant evidence at length, and who have had such evidence and the record not only carefully presented, but also thoroughly explained, of the opportunity to decide this matter. It is not for the circuit court to second-guess the determination reached by these individuals by utilizing inconsistent factual findings. *See Clark v. R.E.L. Products, Inc.*, 972 F.2d 317, 318 (10th Cir. 1992). However, the appellate court

made its decision based on what its believes the facts to be, as extrapolated from a purely "cold record." In ruling on the motion for judgment as a matter of law, the court must view the evidence in the light most favorable to the Petitioners, as they are the nonmoving party. *Agrinaga v. United Food & Commercial Worker Int'l,* 993 F.2d 1463, 1469 (10th Cir. 1992, *cert. denied,* __ U.S.__, 114 S. Ct. 880 (1994). And while the appellate court asserts that it applied this same standard, as did the trial court, this statement cannot be taken on face value due to the obvious misconstrued facts and the resulting erroneous findings of both fact and law, much of which is the result of the court's refusal to address and consider its opinion in *Bradbury v. Phillips Petroleum Co.,* 815 F.2d 1356 (10th Cir. 1987). The action the appellate court took was serious, one with rigorous standards, one that should be cautiously and sparingly granted. *Western Plains Service Corporation v. Ponderosa Development Corporation,* 769 F.2d 654 (10th Cir. 1985). *See also Harris v. Ouinones,* 507 F.2d 533, 535 (10th Cir. 1974; *Community Nat. Life Ins. Co. v. Parker Square Savings & Loan Ass'n,* 406 F.2d 603, 605 (10th Cir. 1969); and *Champion Home Builders v. Shumate,* 388 F.2d 806, 808 (10th Cir. 1967). Also, granting of such a motion is proper "only if the evidence points but one way and is susceptible to no reasonable inference which may support the opposing party's position." *O.E.R. Inc. v. Hickerson,* 880 F.2d 1178, 1180 (10th Cir. 1989). Respondent failed to show that reasonable minds could not differ on the evidence presented. Also, it should be clear to this court that Petitioners offer more than adequate proof that the jury had ample evidence upon which to base their verdict, a valid decision subsequently taken away by the improper actions of the appellate court. The Petitioners contend that the opinion of the appellate court ignored material facts and law and is inconsistent with other cases decided by that same court. Further, the Petitioners contend that the appellate court misconstrued material factual determinations and substituted the court's interpretation of the facts which were lawfully for the determination of the jury and the trial court.

The circuit court misconstrued the facts that (1) Bill Bigbee was merely hired to gather information on the Petitioners in order to adjust their claim; (2) that he is an "independent adjuster", and therefore, Lloyd's is not liable for his actions; and (3) that the surveillance of Petitioners' home was not "outrageous" and thus not deserving of recovery for the intentional infliction of emotional distress. Alternatively, the facts as presented to the trial court and the jury would and did lead a reasonable jury to determine that Bigbee was not merely hired to gather information on and adjust Petitioners' claim, that he is indeed an supervisor/ agent of Lloyd's and not an independent adjuster, and that the surveillance, with or without the shooting of the family pet, was undoubtedly outrageous.

The first misconception on the part of the appellate court is that Bill Bigbee was not hired to gather information on the Petitioners to adjust their claim. In proof of this, the Petitioners offered the fact that their insurance claim was already denied, and their policy with Lloyd's canceled. Therefore, it would be impossible for Bigbee to investigate and adjust a claim that was denied as insurance coverage was already canceled prior to his arriving at the Petitioners' property. In addition, Bigbee himself testified that he was not hired to investigate the claim (Aplt. App. 514, 522). As a result, it should be clear and obvious to this Honorable Court that the appellate court did indeed error in finding that Bigbee was acting in such capacity when the record of the trial court and jury determinations clearly supports an opposite fact.

In proof of the appellate courts' misconstrued understanding of the facts surrounding Bill Bigbee's involvement in this matter, Petitioners now disprove the belief that Bigbee served as an independent adjuster by demonstrating that he was a supervisor for Lloyd's. To accomplish this, Petitioner offers the facts presented to the trial court and jury showing the situation

surrounding Lloyd's Insurance Company operations in the state of Oklahoma and the incident at Purcell.

Lloyd's presence in the state is represented by Max Acton, Bill Starbuck, and Bill Bigbee who together effectively are Lloyd's in Oklahoma. Max Acton is the authorized agent who issues all of Lloyd's policies in Oklahoma. (Aplee. Supp. App. 3-7). Acton also completely owns S&A Claim Service. (Aplt. App. 586, 513). Acton and S&A Claim Service have the same address and telephone number. (Aplee. Supp. App. 19, 20-22). Max Acton delegated the Purcell operation to Bigbee. Bigbee was tied to Acton in that he reported the events of the Purcell operation to Acton who in turn reported to Lloyd's. In fact, Bigbee's reports were made on S&A Claim Service forms. (Aplt. App. 446; Aplee. Supp. App. 19, 20-22, 41). It should also be noted that Acton was paid for the work of Bigbee. (Aplee. Supp. App. 33, 23, 36). In carrying out the Purcell assignment, Bigbee hired and also supervised the guards who terrorized Petitioners, as verified by one of the guards, Donald Leonard, who was both hired by Bigbee and instructed where to position himself on Petitioners' property in order to surveil the home. (Aplt. App. 587, 684-94). Bigbee also supplied Leonard with the equipment necessary to carry this instruction out. (Aplt. App. 684-97). Because Bigbee was in charge of the guards, evidenced by the fact that they reported to him directly as their supervisor, Bigbee could be determined by a reasonable jury to in fact be a supervisor. In further support of this finding, the court in *Gilmore v. Constitution Life Ins. Co.*, 502 F.2d 1344 (10th Cir. 1974), held that where the supervisor has complete control of the branch, as here, the agent represents a vice principal. Under Oklahoma law, a vice principal is an employee to whom the master delegates duties which the law imposes upon the master, and who is in charge of the master's business or any department thereof, whose duties are supervision, direction, and control of the work over subordinate employees engaged therein. *Haynie v. Haynie*, 426

P.2d 717 (Okla. 1966). Here, Bigbee exercised the requisite supervision, direction and control of the surveillance of Petitioners' property. When an employee hires and fires and exercises entire and absolute authority, he is a principal. *Chap-Tan Drilling Co. v. Myers,* 225 P.2d 373 (Okla. 1950). The underwriters in London must, as a matter of necessity, delegate the insurance operations in Oklahoma to Bigbee and Acton establishing them as vice principals. Lloyd's is attempting to cut off liability at a higher level in an attempt to avoid responsibility, however, policy dictates that failing to hold Lloyd's responsible for Bigbee's supervision of the guards, the surveillance, and the shooting of the family pet would encourage any principal to loose his agent on the public and then merely sit back and exercise little or no supervision without recourse upon themselves. Thus, it is clear that considering this relationship, it was appropriate for a reasonable jury and the appellate court to view the evidence in the light most favorable to the plaintiff and find that Bigbee was a supervisor carrying out the wishes of both Acton and Lloyd's under their direction, and not an independent adjuster as the appellate court found him. *See Western Plains Service Corporation v. Ponderosa Development Corporation,* 769 F.2d 654 (10th Cir. 1985).

In opposition to this, are the findings of the appellate court which found Lloyd's not liable for the acts of the guards or Bigbee. The circuits court's argument is based on their inconsistent interpretation that the guards and Bigbee were acting outside the scope of their respective employment.

This is a legal fiction, in that (1) the guards did only what they were directed to do by their supervisor, Bill Bigbee, clearly acting within the scope of their employment, and furthering the business of Acton and thus Lloyd's through surveillance of Petitioners' property; (2) Bill Bigbee, as we established above, can and was found to be a principal of Lloyd's by a reasonable

jury, thereby effectively establishing Lloyd's liability for his actions; and finally (3) the court made a huge prejudicial error by not recognizing Petitioners' analysis based on *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356 (10th Cir. 1987), a decision reached by this same court.

The appellate court's argument concerning the guards' compliance with their scope of employment is unnecessary because it was determined that Bill Bigbee was their supervisor, controlling their activities in Purcell, and because Bigbee, or a guard acting under strict order and in the presence of Bigbee, shot the family dog. This was witnessed by Donald Leonard. (Aplt. App. 747, 702, 745, 761-2). Because of Bigbee's supervisory role, liability is established with him for both instructing the surveillance to be carried out in the manner it was, and for the shooting—making the argument for the guard's lack of authority unnecessary. This serves as another example of an inconsistent finding of fact on the part of the appellate court.

The appellate court states that "[c]onduct falls within an agent's scope of authority if the agent has actual or apparent authorization to take a specific act on the principal's behalf" *Tulsa General Drivers Union v. Conely*, 288 P.2d 750, 754 (Okla. 1955) (per curiam). The court goes on to analyze the acts of the guards and of Bigbee under this principle, concluding that their actions were outside the scope of their employment. By applying this standard, a reasonable jury could determine that Acton and Bigbee were acting well within their authority because Lloyd's delegated their Oklahoma operations to Acton, who in turn delegated the Purcell operation to Bigbee, to further Lloyd's business. However, Petitioners assert the appellate court applied the facts and law differently. This combined with the courts' refusal to consider or apply *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356 (10th Cir. 1987), necessarily resulted in vastly inconsistent findings of both facts and law. The decision of the

appellate court would be inconsistent with *Bradbury.* In *Bradbury,* a jury held Phillips Petroleum Company responsible for the assault and battery committed against *Bradbury* by employees of Desert Drilling Company while Suda, an engineer and employee of Philips was present. In that case the court stated:

> Though there was some dispute about Suda's actual statement, there was testimony that the jury might have reasonably believed that on the day of the assault, *Suda gave Bradbury permission to take pictures and then failed to inform the drillers* she had given her approval... The jury might have reasonably concluded that Suda was acting in a ***supervisory*** role at the time of the assault and battery of *Bradbury* and that *she consented to the drillers' action either* ***expressly*** or by ***implication*** by raising no objection . . . . The jury might have reasonably concluded that Suda had *knowledge of all material facts* . . . . There is no indication that Phillips reprimanded or complained to Desert Drilling Company. In fact, Phillips continued to employ Desert Drilling Company after the incident."

Emphasis added.

Petitioners show that, as in *Bradbury,* the jury could reasonably determine that Bigbee was acting in a supervisory capacity either *expressly* or by *implication.* The circuit court ignored *Bradbury* and failed to discuss this important case decided by the same court. The law and facts in *Bradbury* are very similar to the instant case with certain exceptions. The facts of the instant case are even more grievous in that a reasonable jury

could determine that the supervisor himself shot and killed the dog, as witnessed by David Leonard, a guard hired by Bigbee; that Bigbee was a supervisor and not a mere "independent agent"; that Acton or Bigbee consented to the killing and/or harassment by raising no objection; and that Acton or Bigbee had knowledge of all material facts surrounding the incident and did not reprimand or complain to Bigbee or the guards; in fact, guards were present at the property for several days after the incident and well after Acton and Bigbee knew they were causing severe emotional distress to the Petitioners. The facts in *Bradbury* correctly state the law as Suda and Bigbee could be construed by a reasonable jury to be "supervising principals" or "vice-principals". *Id.* at 1356. Further, in light of the powerful nature of *Bradbury* in support of Petitioners' position, it should be obvious that the appellate court's outright refusal to consider this important precedent necessarily violates the standard of viewing the evidence in a light most favorable to Petitioners — providing demonstrative evidence of the improper nature of the appellate court's inconsistent findings.

The opinion rendered by the appellate court in the instant case requires the underwriters in London, Lloyd's home office, to have knowledge of the acts of Acton before Lloyd's is responsible for the acts of Bigbee. This is clearly improper as this would insulate Lloyd's, or any principal with subordinate agents conducting business for them, from virtually any agency-based lawsuit. In *Bradbury,* the court noted that "the jury might reasonably have concluded that Suda had knowledge of all material facts." *Id.* Petitioners contend that it is not necessary that Lloyd's in London have knowledge of all material facts so long as a reasonable jury could determine that Bigbee or Acton had knowledge of all material facts. It should be immaterial that an underwriter in London may or may not have been advised of the shootings and terror activities of Acton and/or Bigbee. As such, the jury could determine that Acton ratified the acts as he knew

the dog had been shot. Therefore, it follows that if Acton has authority to represent Lloyd's as their agent in Oklahoma and to issue insurance policies in furtherance of their business, then Acton is capable to establishing liability for Lloyd's in Oklahoma for this incident.

The next inconsistent finding of the appellate court Petitioners feel was improper was that the actions of the guards and Bigbee in watching the property, terrorizing Petitioners, shooting Bandit, the family pet, and denying the Petitioners of adequate police and fire protection did not constitute intentional infliction of emotional distress. Petitioners offered the testimony of Ricky Lee, the assistant police chief of Purcell at the time of the incident. Lee gave the court and jury uncontroverted expert testimony that surveillance such as that conducted by Lloyd's is considered unsafe and improper unless it is done covertly. Obviously the surveillance was not covert and instead, was designed to scare and intimidate the petitioners. It even deprived the petitioners of their right to police protection as the Purcell Police Department, the Purcell Fire Department, and the McClain County Sheriffs Department are in the same town and apparently believed that the sheriff should not respond to Petitioners' call for help. As a result, a reasonable jury could determine from the testimony of Lee that the acts of the guards, standing alone, without the shooting of the family pet by Lloyd's supervisor, were outrageous and would not be tolerated in civilized society. This court should distinguish law and facts from the cases cited by Respondent and the appellate court from the instant case as important facts were excluded. In this vein, petitioners show (1) that the area where the petitioner resides is a very rural, remote area; (2) that cars parked next door facing their property (Aplt. App. 819-23); (3) that they could constantly hear the guards talking at all hours of the day and night (Aplt. App. 837, 823-4); (4) that Petitioners were denied police protection (Aplt. App. 824); (6) that men were observed armed with guns. Any

reasonable jury could determine that these actions constituted "outrageous" behavior and an intolerable situation.

Case law in this area holds that even the threat of shooting a dog has been held to support a claim of intentional infliction of emotional distress. *Reeves v. Melton,* 518 P.2d 57 (Okla. App. 1974). In this case the dog was actually shot and killed, proving Petitioners' assertion of emotional distress. Further, the court in *McMilliain v. Bosie Cascase Corp.,* 533 P.2d 343 (Or. 1975), held that "[i]f the surveillance was in an unreasonable and obtrusive manner the defendant will be liable . . ." Lloyd's had to know that its guards were armed as its own supervisor carried a gun. In addition, even after Acton knew the dog had been shot and the family terrorized, Lloyd's and its supervisors continued placing guards on the property for several days. From this, it should be obvious to this learned and honorable court, that the surveillance of Petitioners' property, with or without the shooting of the dog, constituted a serious and intentional infliction of emotional distress.

CONCLUSION

One would have to conclude, therefore, that the highest Court of the land would be clearly oriented away from such inappropriate action on the part of the appellate court. Petitioners maintain that it would be illogical to conclude that this Court would wish to see an inconsistent application of the proper standard of review, resulting in blatant disregard for the fact finding ability of the lower court and jury. In light of the evidence brought forward , this honorable court should be recognizant of the inconsistent findings on the part of the appellate court and their improper repeal of the trial court and jury's findings and verdict. As mentioned above, the standard to be applied by the appellate court in review of the trial court's findings, that of viewing the evidence in the light most favorable to the Petitioners

necessarily, was not applied in the appellate court's review of this matter. This is evidenced by the inconsistent findings of fact, and the court's refusal to consider *Bradbury*, a case proven to be both substantively applicable and controlling. It is clear that the standard of review cannot be adhered to when such a decisive case is not examined and applied to the facts. From this, Petitioners feel the appellate court's improper acts and subsequent decision should be overturned, and the decision of the original fact finder reinstated in favor of the Petitioners.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AUGUST 15, 1995

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-6099

ROBERT CLARK; BILLIE CLARK, Husband and Wife; ROBERT ANSON CLARK, a minor child by and through his mother and next friend, Billie Clark; BRANDI JONES and BRITINI JONES, minor children by and through their mother and next friends, ANGELA MARIE JONES; BRANDON NEAL CLARK, a minor child by and through his mother and next friend MARY LOU DUVALL,

Plaintiffs-Appellees,

v.

THOMAS WILLIAM BRIEN, representative of UNDERWRITERS AT LLOYD'S, LONDON,

Defendant-Appellant,

and

SPHERE DRAKE INSURANCE COMPANY,

Defendant.

ORDER
Entered August 15, 1995

Appendix A

Before EBEL and KELLY, Circuit Judges, and BROWN*, District Judge.

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* The Honorable Wesley E. Brown of the United States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

s/ Opal A. Carter
By Opal A. Carter
Deputy Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JULY 14, 1995

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-6099

ROBERT CLARK and BILLIE CLARK, husband and wife; ROBERT ANSON CLARK, a minor child by and through his mother and next friend, BILLIE CLARK; BRANDI JONES and BRITINI JONES, minor children by and through their mother and next friend, ANGELA MARIE JONES; BRANDON NEAL CLARK, a minor child by and through his mother and next friend MARY LOU DUVALL,

Plaintiffs-Appellees,

v.

THOMAS WILLIAM BRIEN, representative of UNDERWRITERS AT LLOYD'S, LONDON,

Defendant-Appellant,

and

SPHERE DRAKE INSURANCE COMPANY,

Defendant.

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-89-2189-L)

Appendix B

Mickey James of Green, James & Williams, Oklahoma City, Oklahoma (and Marcia James of Green, James & Williams, with him on the brief) for Defendant-Appellant.

Jack F. Tracy of Blythe, Tracy & Baumgardner, Purcell, Oklahoma for Plaintiffs-Appellees.

Before EBEL and KELLY, Circuit Judges, and BROWN*, District Judge.

EBEL, Circuit Judge.

The Plaintiffs brought this diversity action against Thomas William Brien ("Brien"), as a designated representative of Underwriters at Lloyd's London ("Lloyd's"), for the intentional infliction of emotional distress.[1] The Plaintiffs claim that Lloyd's should be held liable for the conduct of several guards, hired to surveil the Plaintiffs' property, who allegedly shot the Plaintiffs' pet dog. A jury found for the Plaintiffs and awarded them actual and punitive damages. The district court denied Lloyd's Rule 50(b) motion for judgment as a matter of law and Lloyd's brought

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* The Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

1. Although Brien is the named defendant in this case, the parties stipulated that Brien is named solely in his capacity as a representative underwriter of Lloyd's, which is not an insurance company that can be sued easily as an entity. *See* Aplt's App. Vol. I, at 108, 141-42. The parties agreed that Brien was named solely "to avoid the burdensome procedure of naming as defendants each underwriter subscribing the policy." *Id.* Because a judgment binding Brien as the representative defending underwriter "binds all underwriters subscribing the policy," this opinion will refer for convenience to the Defendant as "Lloyd's," rather than as the named representative. *Id.*

this appeal. Because we find that there was insufficient evidence for a reasonable jury to hold Lloyd's responsible for the guards' conduct under the doctrines of principal-agent liability, we reverse the court's denial of Lloyd's motion and order judgment entered in favor of Lloyd's.[2]

BACKGROUND

In 1988, Robert Clark and his wife Billie Clark purchased an insurance policy on their homestead. The policy was issue jointly by Lloyd's and by Sphere Drake Insurance Company ("Sphere Drake"). In 1989, the Clarks contacted their insurance agent to clarify whether this policy also covered a separate home in which the Clarks held a financial interest, which had been destroyed by fire. This inquiry prompted Lloyd's to have its authorized agent, Acton Inc., hire an independent adjuster to obtain information on the Clarks. The adjuster, Bill Bigbee ("Bigbee"), under the oversight of his supervisor, Bill Starbuck ("Starbuck"), discovered that the Clarks had failed to disclose their involvement in numerous fires in the recent past, one or more of which had destroyed houses on the very property that Lloyd's and Sphere Drake were insuring. Based on this information, Acton Inc. mailed the Clarks a notice of cancellation of their insurance policy on January 19, 1989. Abiding by the policy's requirement to provide thirteen days notice, the cancellation was set to take effect on February 1, 1989.

On January 23, 1989, Robert Clark informed Acton Inc. that he would be away from his property for several days. The head of Acton Inc., Max Acton, feared that the Clarks' homestead might mysteriously burn down before the policy cancellation could take

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2. We also deny Appellees' motion to file a surrebuttal brief.

effect, so he had several off-duty firefighters and police officers hired to surveil the Clarks' property during the interim period between January 23rd and 31st. The guards were instructed to watch the Clarks' homestead from an adjoining lot and notify the fire department if they saw any signs of fire. Evidence suggests that Acton Inc. or Starbuck may also have hired a separate investigator, Donald Leonard, to photograph the Clarks' property and any people entering or leaving the Clarks' home.

Based on alleged misconduct by the guards and Bigbee during this period of surveillance, the Clark family filed suit against Lloyd's and Sphere Drake as the joint issuers of their insurance policy. The Clarks claimed that the guards committed trespass and intentional infliction of emotional distress, for which Lloyd's and Sphere Drake should be held responsible under the theory of principal-agent liability. The Plaintiffs include Robert and Billie Clark, their son Robert Anson Clark, their granddaughters Britini and Brandi Jones (brought by the granddaughters' mother, Angela Marie Jones), and their grandson Brandon Neal Clark (brought by the grandson's mother, Mary Lou Duvall), all of whom allegedly suffered severe emotional distress from the guards' behavior.[3]

At trial, members of the Clark family testified that the guards did not just passively surveil their homestead from the adjoining lot, but also trespassed upon their land. Because Robert Clark did not know who the guards were or the reason for their presence, he

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3. The Plaintiffs also brought claims for breach of contract, bad faith breach of contract, invasion of privacy, false imprisonment, and various constitutional and state statutory violations. However, these claims were disposed of before the case was submitted to the jury and are not before us on this appeal. The original suit also included claims by and against additional parties. Those claims have since been removed from this case and are also not before us on this appeal.

claims that he became very concerned about his family's safety, and even decided to drive his visiting in-laws back to their hometown out of fear for their well-being. Upon returning home, Robert Clark found his wife, son, and three grandchildren inside the house with the doors locked. The children were upset and said that one of the guards had shot and killed their pet dog, Bandit. When Robert Clark went outside to investigate, he found a pool of blood on his property and evidence that the dog had been dragged over their fence. Although the Clarks believed that one of the guards was responsible for the shooting, other evidence suggested that Bigbee, the independent adjuster that Acton Inc. hired to gather information on the Clarks, may have been involved.

At the end of the surveillance period on January 31, 1989, Lloyd's was provided its first information about these events. Max Acton faxed a letter to Lloyd's explaining that Acton Inc. had cancelled Lloyd's insurance policy on the Clarks' homestead based on the independent adjuster's discovery of the Clarks' prior fire losses. The letter informed Lloyd's only that Acton Inc. had "hired four guards around the clock to keep [Robert Clark] from burning [his] house." On February 3, Lloyd's faxed a response to Acton Inc. saying that the leading underwriter "agrees fully with your actions," but "await[s] full details." On February 10, Lloyd's faxed a second response to Acton Inc. which said that after consulting with an attorney the underwriters "fully agree with Max Acton's actions to date."

At the close of evidence at trial, Lloyd's made a Rule 50(a) motion for judgment as a matter law. The district court denied the motion and submitted the trespass and tort claims to the jury. The jury found for Sphere Drake on both the trespass and intentional infliction of emotional distress claims and for Lloyd's on the

trespass claim. However, the jury found against Lloyd's on the intentional infliction of emotional distress claim and awarded the Plaintiffs actual and punitive damages. Lloyd's filed a Rule 5(b) renewed motion for judgment as a matter of law on the intentional infliction of emotional distress claim. The district court denied Lloyd's this motion and Lloyd's brought this appeal. Thus, Lloyd's is the only defendant in this appeal and the intentional infliction of emotional distress claim is the only claim at issue.

ANALYSIS

In reviewing the denial of Lloyd's motion for judgment as a matter of law after trial, we apply the same standard as the district court to decide if, viewing the record in the light most favorable to the Clarks, there is evidence upon which a reasonable jury could properly find against Lloyd's. *See Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1463, 1469 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 880 (1994). Lloyd's argues that judgment as a matter of law is warranted on the intentional infliction of emotional distress claim because: (1) the guards' conduct cannot be considered "outrageous" as a matter of law; and (2) even if the guards' conduct could be considered outrageous, there was insufficient evidence from which a jury could hold Lloyd's liable for that conduct. Because we agree with the second argument, we reverse the district court's denial of Lloyd's renewed motion for judgment as a matter of law.[4]

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4. This disposition makes it unnecessary for us to address Lloyd's alternative arguments that: (1) the denial of Lloyd's motion for judgment as a matter of law should be reversed with respect to Brandon Clark because there was insufficient evidence regarding Brandon Clark's damages; (2) the denial of Lloyd's motion for judgment as a matter of law should be reversed with respect to all plaintiffs other than Robbie Clark because Robbie Clark was the sole owner of the dog; and (3) the district court erred in denying Lloyd's alternative motion for a new trial.

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In order to prevail on their intentional infliction of emotional distress claim the Plaintiffs had to establish two things. First, they had to prove that the guards intentionally or recklessly caused them severe emotional distress through conduct that was "'so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *See Eddy v. Brown*, 715 P.2d 74, 75 (Okla. 1986) (quoting Restatement (Second) of Torts, § 46 cmt. d. (1977)).[5] Second, the Plaintiffs had to prove that Lloyd's should be held responsible for the guards' conduct under the doctrines of principal-agent liability.

It is the court's duty to determine whether the conduct at issue reasonably may be regarded as "outrageous" before submitting the claim to a jury. *Eddy*, 715 P.2d at 76-77. In this case, we do not believe that the alleged surveillance, by itself, could be considered outrageous as a matter of law. *See, e.g., Forster v. Manchester*, 189 A.2d 147, 148-52 (Pa. 1963) (applying Restatement (Second) of Torts § 46 to hold that it was not outrageous for insurance company's investigators to follow plaintiff and videotape her to verify her injuries); *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1105-06, 1115 (Md. Ct. Spec. App.) (applying Restatement (Second) of Torts § 46 to hold that employer's alleged surveillance of plaintiff's "comings and goings" was insufficiently outrageous to survive summary judgment), *cert. denied*, 508 A.2d 488 (Md.) *and* 479 U.S. 984 (1986). Only by considering *both* the surveillance *and* the shooting of the Clarks' dog could the alleged conduct be regarded as sufficiently outrageous to submit the tort claim to the jury. *Cf. Reeves v. Melton*, 518 P.2d 57, 60-63 (Okla. Ct. App. 1973)

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5. Because this case was filed based on diversity jurisdiction, Oklahoma law applies.

(finding that the combination of an agent's repeated visits to plaintiffs' home, trespass on plaintiffs' property, and threats to kill plaintiffs' dogs was sufficiently outrageous to support a jury finding for plaintiffs). Thus, the Plaintiffs had to produce evidence at trial from which a jury reasonably could hold Lloyd's liable for *both* the guards' surveillance *and* their alleged shooting of the dog.

For Lloyd's to be liable for the guards' actions, the Plaintiffs had to show that the guards were Lloyd's agents and: (1) that the guards were acting within the scope of their authority and in the course of their employment, *Hill v. McQueen*, 230 P.2d 483, 484 (Okla. 1951), or (2) that Lloyd's ratified the guards' acts with knowledge of all the material facts, *Urabazo v. Humpty Dumpty Supermarkets*, 463 P.2d 352, 354 (Okla. Ct. App. 1969). There was clearly sufficient evidence at trial from which a jury could find that the guards were Lloyd's agents, because they had been hired on Lloyd's behalf by Acton Inc., Lloyd's undisputed authorized business agent. However, Lloyd's argues that there was no evidence that the guards' conduct, particularly the shooting of the Clarks' dog, was either within the scope of the guards' authority or knowingly ratified by Lloyd's.

Scope of Authority

Conduct falls within an agent's scope of authority if the agent has actual or apparent authorization to take a specific act on the principal's behalf. An act is also deemed within an agent's scope of authority if it is within the scope of his employment and taken in furtherance of the principal's business. *See Tulsa General Drivers Union v. Conley*, 288 P.2d 750, 754 (Okla. 1955) (per curiam). After reviewing the trial record in light of these standards, we agree with Lloyd's that there was insufficient evidence from which a jury could find that shooting the Clarks' dog was within the scope of the guards' authority.

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Max Acton testified that he employed the guards for the limited purpose of watching the Clarks' homestead from the adjoining property and notifying the fire department if they saw signs of fire. The guards all testified similarly, stating that they were hired solely to watch the Clarks' home from the adjoining lot and to contact the fire department if they saw any indication of fire. It was undisputed that the guards had permission to enter the property adjoining the Clarks' land and that they were not authorized to enter the Clarks' property. Although some of the off-duty officers acknowledged that they had their guns with them during the surveillance period, there was no evidence from which a jury could find that the guards were authorized to use a firearm or that Lloyd's knew they had guns. To the contrary, testimony indicated that the guards were expressly instructed that "no guns" were allowed. Based on this evidence, a jury could not reasonably find that the guards were authorized to shoot the Clarks' dog.

Shooting the Clarks' dog also could not reasonably be considered incidental to and in furtherance of an authorized act. Shooting the dog was not related to nor would it have advanced the guards' limited employment duties of watching for and reporting signs of fire. *Cf. Tulsa General*, 288 P.2d at 753 (holding that an agent's assault on the target of a picket line could not "properly be contemplated as an incident to the exercise of ordinary authority to act as a peaceable picket"). The guards were not instructed to conceal themselves and did not attempt to do so, so shooting the dog could not have been done to prevent the dog from revealing the guards' presence.[6]

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6. A private detective named Ricky Lee did testify as an expert that surveillance generally is considered unsafe and improper unless it is done covertly. However, Lee's testimony provided no evidence from which a jury could find that

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Oklahoma courts have repeatedly endorsed the general rule that an agent's tortious or criminal assault on a third party cannot be considered within the scope of the agent's authority, unless the assault could have been "anticipated by the employer" as a foreseeable means of accomplishing the job for which the agent was employed. *See, e.g., Allison v. Gilmore, Gardner & Kirk, Inc.*, 350 P.2d 287, 290-92 (Okla. 1960) (holding that employer was not liable when employee got into a fight with a third party who challenged the way the employee was doing his job); *Tulsa General*, 288 P. 2d at 753 (holding that "'[i]t is not, as a general rule, within the scope of the servant's employment to commit an assault upon a third person and the master is not liable for such an assault, though committed while the servant was about his master's business'") (quoting 2 Cooley on Torts (3d ed.) at 1037). Because shooting a dog "is not a recognized or usual means resorted to" for accomplishing non-covert surveillance, *see Hill*, 230 P.2d at 486, it could not have been "anticipated by the employer," *see Allison*, 350 P.2d at 292, and Lloyd's therefore could not be liable for it.

As noted above, some evidence suggested that is was not one of the guards but rather Bigbee, the independent adjuster hired by Acton Inc., who was involved in shooting the dog. Even

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the guards in question were instructed to or attempted to conceal themselves from the Clarks. The testimony was relevant only to the issue of whether the guards' conduct could be considered extreme or outrageous.

There was also some evidence that Donald Leonard, the man who may have been hired by either Acton Inc. or by one of Acton Inc.'s employees to photograph the Clarks' property, had attempted to conceal himself. However, there was no evidence that Leonard was involved in the dog incident, so shooting the dog could not reasonably have been regarded as incidential to his alleged employment.

assuming that the jury could have found that Bigbee did the shooting, we reach the same conclusion on the issue of Lloyd's liability as Bigbee's principal. It was undisputed that Bigbee was hired to gather information on the Clarks in order to adjust their insurance claim. There was no evidence from which a jury reasonably could have found that shooting the Clarks' dog was a foreseeable means of furthering those duties, or that it could be considered incidental to or within the scope of Bigbee's limited authority to act on Lloyd's behalf.

Ratification

A principal may still be held liable for an act that is beyond the scope of an agent's authority if the principal ratifies the act. *Urabazo*, 463 P.2d at 354. Thus, if the Plaintiffs offered sufficient evidence from which a reasonable jury could find that Lloyd's affirmed the guards' or Bigbee's conduct, the verdict could still be upheld.

For ratification to be valid, it must be done "with knowledge of the material facts." Aplt's App. at 119 (jury instr. 21); *see Beard v. Herndon*, 203 P. 226, 229 (Okla. 1921) ("'A ratification in express terms and with knowledge of the facts of what an agent has done is, of course, equivalent to a prior authority.'") (quoting 31 Cyc. 1262, 1263); *Mason v. Nibel*, 263 P. 121, 122 (Okla. 1938) (per curiam) ("[T]he master is not bound unless he ratifies the unauthorized acts of the servant . . . with knowledge of what had been done by the servant . . . ."). After reviewing the record, we find insufficient evidence from which a jury reasonably could find that Lloyd's knowingly ratified the conduct that forms the basis of the Plaintiffs' tort claim.

As evidence of Lloyd's ratification, the Plaintiffs point to

three letters exchanged between Acton Inc. and Lloyd's after the surveillance was completed. Acton Inc. first faxed a letter to Lloyd's on January 31, 1989, informing Lloyd's that it had cancelled the Clarks' insurance policy after its independent adjuster had learned about the Clarks' prior fire losses, and had "hired four guards around the clock to keep [Robert Clark] from burning [his] house." There was no evidence in the record that Lloyd's possessed any other information about the events that allegedly occurred during the surveillance. Based solely on the information provided in Acton Inc.'s letter, Lloyd's faced a response letter to Acton Inc. on February 3, stating that the leading underwriter "agrees fully with your actions," but "await[s] full details." On February 10, Lloyd's faxed a second response to Acton Inc. which said that the underwriters had consulted with an attorney and "fully agree with Max Acton's action to date."

Because there was no evidence in the record that Lloyd's knew when it faxed its two responses that the guards had possessed firearms or that a guard or the independent adjuster shot the Clarks' dog, the letters cannot be considered a valid ratification of that act. The Plaintiffs argue, however, that evidence existed from which the requisite knowledge could have been *imputed* to Lloyd's, from either of two potential sources. First, evidence suggested that Bigbee, his supervisor Starbuck and Max Acton knew prior to Lloyd's correspondence that the Clarks had been disturbed by the guards' behavior and that their dog had been shot. Second, a memo had been placed in Acton Inc.'s files midway through the surveillance period which noted that Robert Clark "had been raising __ with the guards last night" and had complained to the police about the guards' conduct. Because this information was possessed only by Lloyd's agents, and there was no evidence that Lloyd's accessed this information

before sending the two letters at issue, we reject the Clarks' contention that Lloyd's itself should be deemed knowledgeable of these facts for ratification purposes.

The only evidence of Lloyd's prior knowledge about the events at issue was its receipt of Acton Inc.'s letter of January 31, so that letter defines the scope of any possible ratification. Because the letter did not mention the material facts about the shooting of the Clarks' dog, and because the Plaintiffs had to prove Lloyd's responsibility for both the surveillance and the dog incident in order to support an intentional infliction of emotional distress claim, Lloyd's could not be held liable under the doctrine of ratification.

CONCLUSION

For the reasons stated above, we REVERSE the district court's denial of the Rule 50(b) renewed motion for judgment as a matter of law by Thomas William Brien, representative of Underwriters at Lloyd's London. We instruct the district court to VACATE the jury verdicts and damage awards for each of the Plaintiffs on their intentional infliction of emotional distress claim and enter judgment in favor of the Defendant.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA FILED FEBRUARY 16, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-89-2189-L

ROBERT CLARK, et al,

Plaintiffs,

v.

THOMAS WILLIAM BRIEN, representative of UNDERWRITERS AT LLOYD'S, LONDON and SPHERE DRAKE INSURANCE COMPANY,

Defendants.

ORDER

On December 17, 1993, a jury returned a verdict in favor of plaintiffs and against defendant Thomas William Brien, representative of Underwriters at Lloyd's, London ("Lloyd's"). This matter is before the court on Lloyd's renewed motion for judgment as a matter of law and alternative motion for new trial.

Judgment as a matter of law is proper "only if the evidence points but one way and is susceptible to no reasonable inference which may support the opposing party's position." *Q.E.R., Inc. v. Hickerson*, 880 F.2d 1178, 1180 (10th Cir. 1989). In ruling on the motion for judgment as a matter of law, the court must view the evidence and the inferences in the light most favorable to the plaintiffs, as they are the nonmoving party. *Aguinaga v. United*

Food & Commercial Workers Int'l, 993 F.2d 1463, 1469 (10th Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 880 (1994). Based on this standard, the court concludes that Lloyd's motion must be denied. Notwithstanding Lloyd's arguments, there was sufficient evidence when viewed in the light most favorable to plaintiffs to warrant submission of their intentional infliction claim to the jury. Likewise, it was for the jury to assess the credibility of various witnesses; the court cannot second-guess that determination. In addition, when ruling on a motion for judgment as a matter of law the court is not permitted to disregard the testimony of a witness, even if no other witness corroborated his or her testimony. *See Clark v. R.E.L. Products, Inc.*, 972 F.2d 317, 318 (10th Cir. 1992). Lloyd's Motion for Judgment at a Matter of Law is DENIED.

In the alternative, Lloyd's requests a new trial on the grounds that the jury verdict is contrary to and inconsistent with the evidence and was the result of passion or prejudice. Lloyd's also argues that the jury ignored the court's instructions, particularly Instruction Nos. 20, 21 and 25. The court concludes that a new trial is not warranted. Lloyd's has failed to establish that the jury's verdict is contrary to or inconsistent with the evidence. In addition, the jury's award of actual and punitive damages is not "so excessive . . . as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invalidated the trial." *Whiteley v. OKC Corp.*, 719 F.2d 1051, 1058 (10th Cir. 1983) (citation omitted). As the Court in *Whiteley* observed,

> the determination of damages is traditionally a jury function. This is so because the jury has heard the evidence first hand and has observed the demeanor of the witnesses. The

> jury must have much discretion to fix the damages deemed proper to fairly compensate the plaintiff.

Id. (citations omitted). Finally, Lloyd's argument that the jury ignored the court's instructions is not well-taken. Juries are presumed to have followed the law as given to them by the court. *See United States v. Coleman*, 7 F.3d 1500, 1506 (10th Cir. 1993).

In conclusion, the Renewed Motion of Defendant, Thomas William Brien, Representative of Underwriters at Lloyd's, London, for Judgment as a Matter of Law and Alternative Motion for New Trial as to Jury Verdict Rendered in Favor of Plaintiffs is DENIED.

It is so ordered this 16th day of February, 1994.

s/ Timothy D. Leonard
TIMOTHY D. LEONARD
United States District Judge

APPENDIX D — EXCERPTED TRANSCRIPT OF PROCEEDINGS DATED DECEMBER 13, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-89-2189-L

Proceedings held in
Oklahoma City, OK on
December 13-17, 1993

ROBERT CLARK and BILLIE CLARK, a husband and wife; ROBERT ANSON CLARK, a minor child, by and through his mother and next friend, BILLIE CLARK, BRANDI JONES and BRITTINI JONES, minor children by and through their mother and next friend, ANGELA MARIE JONES, BRANDON NEAL CLARK, a minor child by and through his mother and next friend, MARY LOU DOUVALL,

Plaintiffs,

vs.

THOMAS WILLIAM BRIEN, representative of UNDERWRITERS AT LLOYD'S LONDON and SPHERE DRAKE INSURANCE COMPANY,

REPORTER'S TRANSCRIPT OF PROCEEDINGS
JURY TRIAL
HAD ON December 13, 1993.
VOLUME I
BEFORE THE HONORABLE TIMOTHY D. LEONARD,
UNITED STATES DISTRICT JUDGE
(and a jury.)

Appendix D

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* * *

[61] Q. Well, isn't it true that this letter we read just a little while ago said he had ten prior fires?

A. After we sent them the letter, yes that — if that's the question. I am sorry. I misunderstood your question.

Q. Had you sent them that letter because you believed it was important to know whether he had prior fires; isn't that correct?

A. That is correct.

Q. That's the very reason you were stating that Mr. Clark misrepresented these things, isn't it?

A. I believe that's correct.

Q. Okay, well, let's talk about this investigation that you did then. Did you take a statement or anyone else from Lloyd's, take that statement from Mr. Robert Clark of any kind?

A. We hired an independent adjuster that went out and investigated the fire.

Q. Now, you state that this investigator was an independent, was that Mr. Bill Bigbee?

A. Yes, sir.

Q. Isn't it true that Mr. Bill Bigbee's reports came in on S & A claim forms?

A. Yes, sir.

Q. And had S & A, the company typed right across the top of every one of those?

A. Yes, sir.

* * *

[128] A. Repeat that, please.

Q. In January of 1989, where were you working?

A. I believe I was working for ARROS an Adjusting Company at that time.

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Q. Is that the same company that Mr. Acton owns here in Oklahoma City?

A. I don't know whether Mr. Acton owns it or not. I can't say.

Q. But anyway it was S & A Claims Service?

A. Yes.

Q. How long did you work for them?

A. Oh, I don't know, worked for him a couple years, I guess.

Q. Did you have a supervisor there?

A. Yes, they had a supervisor or claims manager or whatever you called him, yes.

Q. And who was that?

A. Mrs. Bill Starbuck.

Q. Now, this S & A claims, where did the claims come from that you worked on there?

A. Well, that period of time, I worked claims for LLoyd's of London, and I got claims from Scottsdale, Arizona, mobile home claims.

Q. Did you have a territory that you worked?

A. No, not particular territory.

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Q. I am going to ask you, how did you become involved in a

* * *

[200] **BILL STARBUCK**

having been first duly cautioned, examined and sworn upon his oath to tell the truth, the whole truth and nothing but the truth, testified as follows, to-wit:

DIRECT EXAMINATION

Q. State your name, please, sir?

A. Bill Starbuck.

Q. Where do you live Mr. Starbuck?

A. Street address?

Q. Yes, sir.

A. 1908 Lullaby Lane, Midwest City.

Q. And did you used to work for S & A Claims Service?

A. Yes, sir.

Q. What did you do for them?

A. Supervisor, claims manager.

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Q. Who owned S & A Claims Service at the time you worked there?

A. Who owned it?

Q. Yes, sir.

A. Mr. Acton.

Q. Now, were you involved in an investigation in denial of a claim of Mr. Robert Clark?

A. From a supervisory standpoint, yes.

Q. Did you ever go down to his house?

A. No, sir.

* * *

[298] A. No, I sure don't. Just somebody that Paul knew from the bar.

Q. Was it a man or woman?

A. It was a man.

Q. Okay, this man that called you, did you eventually go to Purcell that you mentioned?

A. Yes, I did.

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Q. Okay, when was that, if you can recall?

A. I don't know. It was a few days later. I think it was on — I think it was on Friday, Thursday or Friday. I am not for sure what date it was, it has been so long.

Q. Could you please tell us what happened once you got down to Purcell?

A. I met him there at the truck stop and stuff and he took me to a house out the other side of Purcell, I guess it was, and give me a camera and told me stay there and take pictures and say who came and went.

Q. Did you hear anybody mention who or what the name of the person was that owned the property you were going to go out to?

A. Not right at that time I didn't.

Q. Did you come to hear about it while you were out there?

A. Yes, I did.

Q. And what property did you understand that you were to be watching? Who was/is the owner?

A. Mr. Clark.

* * *

[312] Q. When these gentleman would be coming out there, would the dogs bark at them?

A. Oh, yes.

Q. Now, on this third day that you are talking about here, you say that they had just got there. Please describe from the time they had just gotten there up and through the events that occurred that day, if you could, please?

A. Well, you could hear them coming down the road, the gravel and stuff and then they come up through the field there. When they get up by the fields, the dogs started raising a little bit of cain and stuff. I heard them down there. I was close to the well house and stuff and them coming through the deal, and I heard a shot and then the kids started screaming and stuff and running and I went up to the deal and they had shot the dog, and it was still yelping and hollering and stuff.

I asked why didn't they go ahead and put the dog out of its misery instead of having it suffering like that.

Q. Did the kids stay out in the yard for a while or were they in the yard, you say, when this was going on?

A. Yes, they were in the yard.

Q. How far would they have been from the place that this dog was shot?

A. Oh, maybe a block, something like that.

Q. If you could, on your drawing, could you show the jury where the children were playing out there at this time.

[313] I need that pencil.

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MR. TRACY: May I approach the witness?

THE COURT: Yes.

BY MR. TRACY:

A. This is, I believe —

THE COURT: You will need to speak up, Mr. Leonard.

BY MR. TRACY:

A. They were out here toward the back of the house.

Q. Where was the dog at?

A. Oh, right in here somewhere.

Q. How far would you say that was from where the children were playing.

A. Probably about a block, something like that, half block, somewhere in there.

Q. Had you been playing with the dog on that day?

A. Yes, I had.

Q. Had the dog attempted to bother you or anything at that time?

A. No, he didn't bother me.

Q. Now, you stated that heard a shot?

A. Yes.

Q. Now, were the children still out in the yard at that time?

A. No, when the dog started yelping and stuff they were screaming and running back to the house.

Q. How many children were out there and heard this.

* * *

[315] A. They said that this will stop him from barking now.

Q. Did they act like they were sad or anything about shooting the dog?

MR. JAMES: Objection.

THE COURT: Be sustained. Be sustained. Let the witness testify. You are leading the witness.

BY MR. TRACY:

Q. Did they make any reaction about how they felt about shooting the dog?

A. They thought it was funny.

Q. How do you know that?

A. Just by the way they were acting and laughing.

Q. Then what did you say to them?

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A. I told them I was through with this. They told me nothing like this was supposed to happen. I was just supposed to watch the place and that was it.

Q. Do you know whether or not the children came back out or what they did after that?

A. No, I didn't because as soon as I — they shot the dog, I told them I was finished. I didn't want to have nothing else to do with it. I told them I was leaving and that was it, that they promised me that nothing would happen or nobody would be hurt or nothing, and I had permission, that I wouldn't even get in trouble or nothing being there.

Q. You said there were two men there?

* * *

[360] They were standing there, how far from the dog?

A. Maybe from here to the back of them chairs back there, maybe twenty feet, somewhere around in there.

Q. What was the dog doing?

A. It was yelping and going around in circles.

Q. What were the two men doing?

A. They were laughing about it.

Q. What did you say at that time?

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A. I asked them to put the dog out of its misery because it was suffering.

Q. What did they say?

A. I can't remember right at that time. I just remember them saying that it wouldn't be barking no more.

Q. The man — one of the men that was there, was he the man that hired you?

A. Yes, he was the one that brung me out there and stuff.

Q. The other man, was he the one that had been there the day before?

A. I think he had been there.

Q. Was he the one you said might have been named Butch?

A. Yes, I think so.

Q. What did that man look like?

A. He was oh, probably about 5 foot 8, maybe 160 pounds, 170 around in there, dark complected.

Q. How was he dressed?

* * *

[374] Q. Did it appear that people were living in the house and in the mobile home while you were there?

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A. They could have been. I never went in the house or nothing.

Q. The closest you ever got was the well house or pump house?

A. Yes, sir.

Q. The man that took you out there, did he tell you to cross the fence get up that close?

A. Yes, he did.

Q. Did anyone else take any photographs that you are aware of during that time you were out there?

A. No, sir, I sure don't.

Q. The camera you had was the only camera you saw?

A. Yes.

Q. When the man named Butch was there, did you see any video cameras with him?

A. No, I did not.

Q. Did Butch ever tell you what his connection was to all of this?

A. No, I think he is the one that mentioned it was Robert Clark, though.

Q. Did you ever see any police or fire vehicles while you were out there?

A. No.

Q. Did you ever see anyone that — except the man that hired [375] you that had a gun or a rifle with him?

A. No, that was the only one.

Q. And he had that rifle only on the third day when the dog was shot?

A. Yes.

Q. What type of work do you normally do, Mr. Leonard?

A. I do sheet rocking.

Q. Have you talked to Mr. Clark — well, how many times have you talked with Mr. Clark since you sent him the letter and went out there and talked to him?

A. Four or five times.

Q. When is the last time you talked to him?

A. When he subpoenaed me, I think.

Q. Okay, did you ever have a phone number on how to contact this man that had hired you?

A. No, the only way I knew him was through Paul at the 89ers.

Q. Were you concerned about getting paid that first day when you were out there and didn't have any information except Paul?

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A. No, I had the camera. I had his camera and stuff.

Q. That would be enough security for it?

A. Yes, sir.

Q. When you first went out there, what was your understanding on how many days the job would last?

A. I didn't have no certain deal on it.

Q. The third day you were there, were there very many people

* * *

Appendix D

CERTIFICATE

STATE OF OKLAHOMA)
)SS.
COUNTY OF OKLAHOMA)

I, Charyse C. Crawford, Official Court Reporter in and for the Western District of Oklahoma, do hereby certify:

That I was present at and reported in machine shorthand the oral proceedings had on December 13-17, 1993, before the Honorable Timothy D. Leonard, District Judge, sitting in and for the Western District of Oklahoma, and:

I FURTHER CERTIFY that my notes have since been transcribed and the foregoing is a full, true, and correct transcript of the proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand at my office in the City of Oklahoma City, County of Oklahoma, State of Oklahoma, on this the 8th day of June, 1994.

s/ Charyse C. Crawford
Charyse C. Crawford
Certified Shorthand Reporter
and Registered Professional
Reporter in and for the
State of Oklahoma.